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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

AMLAP ST, LLC et al., Plaintiffs and Appellants, v. CBRE, INC., et al., Defendants and Respondents.	B260822 (Los Angeles County Super. Ct. No. BC459858)

APPEAL from a judgment of the Superior Court of Los Angeles County, Elihu M. Berle, Judge. Reversed and remanded.

Catazarite Law Corporation, Kenneth J. Catazarite, Nicole M. Catanzarite-Woodward and Eric V. Anderston, for Plaintiffs and Appellants, Amlap ST, LLC and Superstition Lookout Delaware, LLC.

LINER, Maribeth Annaguey, and Kathryn L. McCann, for Defendants and Respondents, CBRE, Inc., and Stephen Batcheller.

Amlap ST, LLC and Superstition Lookout Delaware, LLC (collectively Amlap investors) appeal the judgment entered after the trial court granted the motion for summary judgment or, alternatively, summary adjudication as to each of the seven causes of action asserted against CBRE, Inc. and Stephen Batcheller (collectively CBRE defendants) in the Amlap investors' fifth amended complaint. The Amlap investors contend the judgment should be reversed, among other reasons, because the CBRE defendants' motion failed to address the Amlap investors' theory the CBRE defendants had aided and abetted the tortious actions of other defendants named in their lawsuit and because the trial court erred in concluding there had been no actionable misrepresentations or omissions in connection with the Amlap investors' acquisition of their tenant-in-common interest in a commercial building in Orange County. We reverse the judgment and remand with directions to the superior court to enter a new order denying the motion for summary judgment, granting the motion for summary adjudication as to the two claims under the Corporate Securities Law of 1968 and denying the motion as to all other causes of action.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Two-step Transaction for the La Palma Avenue Property*

In 2006 iStar CTL I, L.P., through its real estate broker CB Richard Ellis (now CBRE) and Batcheller circulated an offering memorandum to potential buyers soliciting bids for commercial real property located at 5515 East La Palma Avenue in Anaheim. BH & Sons, LLC, a California limited liability company, ultimately submitted the winning bid and entered into a real estate purchase and sale agreement with iStar CTL I, dated July 26, 2006 (iStar PSA). Six offers had been submitted for the property, ranging from $29 million to $33.5 million. The purchase price stated in the iStar PSA was $34.55 million.

When entering into the agreement to acquire the La Palma Avenue property, BH & Sons and Asset Management Consultants, its managing member, intended to sell direct or indirect fractional ownership interests in the property, apparently with

contemplated tax benefits for the new purchasers. To that end, BH & Sons and Asset Management Consultants provided property information packages and a private placement memorandum to various qualified sophisticated individual investors and business entities. The property information package stated BH & Sons, through Asset Management Consultants, had negotiated a purchase price of $34,550,000 and a real estate commission of $1.3 million would be paid by the seller to Asset Management Consultants. The property information package also referred to market reports that CBRE had produced regarding the rental market and the property's current tenant, Cingular Wireless.

Investors either formed their own single purpose limited liability companies, which purchased an interest in the La Palma Avenue property as tenants in common, or became limited partners in Amlap Venture, L.P., which then purchased a tenant-in-common interest in the property. The cotenancy was operated and managed by BH & Sons pursuant to the terms of cotenancy agreements signed by each investor.

During this time Superstition Lookout, an investment group of retired teachers and coaches, had sold a mobile home park and was looking for a real estate investment that would qualify as an Internal Revenue Code section 1031 tax deferred exchange. Superstition Lookout decided to purchase a 7.039 percent tenant-in-common interest in the La Palma Avenue property for $950,000, relying primarily on the property information package and information obtained by one of its managing members at an August 2006 meeting with several representatives of Asset Management Consultants to discuss the potential investment.

Amlap ST was organized as a single purpose limited liability company to hold Superstition Lookout's tenant-in-common interest; Superstition Lookout owned all the membership interests in Amlap ST. Amlap ST then entered into a purchase and sale agreement with BH & Sons, dated August 17, 2006, which provided BH & Sons was selling the investor's property interest to the investor and assigning and transferring to the investor BH & Sons's rights and remedies under the iStar PSA with respect to the

investor's property interest. The property sale and the tenant-in-common transactions were completed in September 2006.

The cotenancy acquired the La Palma Avenue property through a combination of $12.6 million contributed by the limited liability companies and limited partners who had formed the cotenancy and a loan from PNC Bank. The venture performed according to expectations for approximately three years (through September 2009) when the lease of the sole tenant (Cingular Wireless) ended; no replacement tenant was found and the property remained empty. It subsequently went into foreclosure in May 2010.

2. *The Amlap Investors' Lawsuit*

The Amlap investors filed the instant lawsuit on April 18, 2011 and the operative 67-page fifth amended complaint on July 26, 2012 alleging violations of the Corporate Securities Law of 1968 (Corp. Code, § 25000 et seq.), fraud, breach of fiduciary duty and other related torts. Among those named as defendants, in addition to the CBRE defendants, were Asset Management Consultants; BH & Sons; James Hopper, the president and chief executive officer of Asset Management Consultants; Gloria Hopper, executive vice president and chief financial officer of Asset Management Consultants; Kevin Hopper, vice president of Asset Management Consultants and a lawyer who provided legal services to Asset Management Consultants; and Allen Basso, a certified public accountant working with Asset Management Consultants, and his firm Smith, Linden & Basso LLP (collectively the Hopper defendants). As to the CBRE defendants the Amlap investors asserted causes of action for violation of Corporations Code sections 25504 (second cause of action) and 25504.1 (third cause of action), fraud and deceit (fifth cause of action), negligent misrepresentation (sixth cause of action), breach of fiduciary duty (seventh cause of action), constructive fraud (12th cause of action), and unfair business practices under Business and Professions Code section 17200 et seq. (13th cause of action).

Among the wrongful acts described in the fifth amended complaint, the Amlap investors alleged the tenancy-in-common purchase and sale agreement, like the iStar PSA

itself, falsely represented the property purchase price was $34,550,000 including a $1.3 million commission to be paid by iStar CTL I, the property seller, to Asset Management Consultants. In fact, the fair market value of the property, and the actual sales price to be paid to iStar CTL I, was at least $1.3 million less than the stated price; and the $1.3 million element was not a commission that would be paid by iStar CTL I but a disguised markup for syndication fees to be paid to Asset Management Consultants and the Hopper defendants by the tenant-in-common investors. In addition, the operative complaint alleged the likelihood of Cingular Wireless extending its lease past 2009 and the degree of interest expressed by the County of Orange in leasing the property if space became available were misrepresented in the various offering materials used to persuade the Amlap investors to acquire their interest in the La Palma Avenue property. The pleading alleged the CBRE defendants "materially aided, assisted and participated in the solicitation of [the Amlap investors] by preparing and approving as to form the misrepresentations . . ." or, alternatively, aided and abetted the Hopper defendants in their use of false statements and omission of material information to obtain the Amlap investors' participation in the acquisition of the La Palma Avenue property.

3. *The Motion for Summary Judgment or, Alternatively, Summary Adjudication*

The CBRE defendants moved for summary judgment or, alternatively, summary adjudication arguing the undisputed evidence established the CBRE defendants were iStar CTL I's broker for the sale of the La Palma Avenue property to BH & Sons and were not involved in any way in the Amlap investors' subsequent investment as a tenant in common in that property. As such, the CBRE defendants did not prepare or assist in the preparation of any of the marketing materials used by BH & Sons and Asset Management Consultants, did not provide an expert opinion or consent to the use of any CBRE reports in those marketing materials, made no representations to the Amlap investors about their investment and had no duty to disclose material information to them.

In opposition to the motion the Amlap investors disputed many of the facts the CBRE defendants asserted were undisputed, including the CBRE defendants'

characterization of the sale of the La Palma Avenue property as involving two separate transactions—first a sale to BH & Sons by iStar CTL I, and then a separate sale by BH & Sons of tenant-in-common interests in the property to the investors. Emphasizing title to the property had passed directly from iStar CTL I to the tenants in common and contending material facts in the marketing and offering materials for the tenant-in-common investments were false or omitted, the Amlap investors argued the CBRE defendants knew BH & Sons intended to assign its rights in the iStar PSA and breached duties they owed the investors, as purchasers of the property, to honestly and fully disclose all material facts relating to their investment.

The Amlap investors also contended, based on an expert declaration submitted with their opposition papers, the CBRE defendants had acted as dual agents of iStar CTL I and the investor group by virtue of their role in arranging an August 2006 meeting with representatives of Orange County to explore the County's interest in renting the La Palma Avenue property if Cingular Wireless did not renew its lease because the CBRE defendants expected the new owners (that is, the tenant-in-common investors) to pay a commission if such a lease was negotiated. As a dual agent, the broker owed fiduciary duties to the Amlap investors, which the CBRE defendants breached by failing to adequately investigate the County's interest.

4. *The Trial Court's Order Granting the CBRE Defendants' Motion*

After receiving reply and supplemental briefs and hearing oral argument, the trial court on July 31, 2014 granted the CBRE defendants' motion in its entirety. In a lengthy oral statement of its reasons for granting the motion, with respect to all causes of action other than the two based on alleged violations of the Corporate Securities Law of 1968, the court found the undisputed evidence established the CBRE defendants had represented only iStar CTL I in connection with the sale of the La Palma Avenue property and therefore owed no duty of disclosure to the tenant-in-common investors, including the Amlap investors. In addition, the CBRE defendants' role in arranging discussions with Orange County representatives about leasing the property in the future

was insufficient to create a dual agency relationship with the Amlap investors and, even if it had, any such agency relationship was separate from the Amlap investors' investment in the La Palma Avenue property and did not create duties of disclosure with respect to the acquisition of their tenant-in-common interests.

The court further found, even if the CBRE defendants owed a duty of full disclosure to the Amlap investors, they had not breached that duty through representations or omissions in the property information package because the undisputed evidence established the CBRE defendants did not prepare the property information package (indeed, had never seen it before the filing of this lawsuit) and had no communications with the Amlap investors regarding their investment decision. The court also explained the property information package actually disclosed a $1.3 million commission would be paid to Asset Management Consultants, although the court commented the statement the commission would be paid by the seller "apparently was not true because the commission instead was incorporated in the grossed-up purchase price that diluted plaintiffs' investment." As to statements about the status and intentions of Cingular Wireless with regard to its lease of the property and the interest of Orange County in possibly renting the property, the court found the statements in the property information package were either true or nonactionable opinions about future events.

With respect to the two Corporate Securities Law claims, the court concluded the cause of action for violation of Corporations Code section 25504 failed because the undisputed evidence established the CBRE defendants had not given written consent to be named or referred to in the offering materials provided potential investors in connection with marketing the tenant-in-common interests in the La Palma Avenue property, an essential element for this claim. The court ruled the cause of action for violation of Corporations Code section 25504.1, which imposes secondary liability on parties who materially assist in a securities sale effectuated through misrepresentations of material facts, also failed because the CBRE defendants' role was limited to representing

iStar CTL I and they had no involvement in the sale of securities (the tenant-in-common interests).

Both the unfair business practices cause of action and the request for punitive damages were dependent on the viability of one or more of the other causes of action. Accordingly, the court granted the motion with respect to those matters was well.

The court directed the CBRE defendants to prepare an appropriate order and to give notice. The proposed order, as submitted by the CBRE defendants and signed by the court on September 22, 2014, largely tracked the court's oral explanation for its decision.[1] Judgment was entered on October 3, 2014. Notice of entry of judgment was served on October 22, 2014. The Amlap investors filed a timely notice of appeal.

5. *The Related Arbitration Proceedings*

In January 2013 the trial court granted the Hopper defendants' petition to compel arbitration of all causes of action asserted against them by the Amlap investors in the fifth amended complaint with the exception of legal and accounting malpractice claims.[2] The arbitration hearing was held in January 2014, after entry of the order granting the CBRE

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[1] Although the court's oral statement referred to the evidence upon which it based its decision to grant the motion, the written order, as signed and filed, failed to comply with Code of Civil Procedure section 437c, subdivision (g), which requires the trial court to specify the reasons for its decision to grant summary judgment in an order that "specifically refer[s] to the evidence proffered in support of, and if applicable in opposition to, the motion which indicates that no triable issue exists." However, the de novo standard for appellate review of an order granting summary judgment generally means the lack of a proper order constitutes harmless error. (See *Soto v. State of California* (1997) 56 Cal.App.4th 196, 199 ["[t]he lack of a statement of reasons presents no harm where . . . independent review establishes the validity of the judgment"]; see also *Byars v. SCME Mortgage Bankers, Inc.* (2003) 109 Cal.App.4th 1134, 1146 [giving as example of when noncompliance with Code Civ. Proc., § 437c, subd. (g), is not harmless "when the trial court has discretion to ignore a party's declaration that conflicts with the party's deposition testimony"]; *W. F. Hayward Co. v. Transamerica Ins. Co.* (1993) 16 Cal.App.4th 1101, 1111 ["meaningful appellate review" is "a key objective of subd[.] (g) of [§] 437c"].)

[2] We grant the CBRE defendants' motion for judicial notice of documents relating to the arbitration proceedings involving the Hopper defendants.

defendants' motion for summary judgment at issue in the pending appeal. The arbitrator, Richard Chernick, issued a final award in September 2014, which ruled the Amlap investors' claims for fraud, negligence, negligent misrepresentation and breach of fiduciary duty were barred by the governing statutes of limitations and failed in any event because the Amlap investors had failed to prove reasonable reliance on alleged misrepresentations by the Hopper defendants. The arbitrator also ruled the proximate cause of the investors' losses was the financial crisis that made it impossible to find a new tenant for the La Palma Avenue property, not any alleged misrepresentations.

The trial court confirmed the arbitration award and entered judgment in favor of the Hopper defendants in February 2015. The Amlap investors have also appealed from that judgment (case no. B263056), arguing in part the court erred in ordering their claims against the Hopper defendants to arbitration under the arbitration clause contained in the iStar PSA.

DISCUSSION

1. *Standard of Review*

A motion for summary judgment or summary adjudication is properly granted only when "all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).)[3] We review a grant of summary judgment or summary adjudication de novo and decide independently whether the facts not subject to triable dispute warrant judgment for the moving party or a determination a cause of action has no merit as a matter of law. (*Hartford Casualty Ins. Co. v. Swift Distribution, Inc.* (2014) 59 Cal.4th 277, 286; *Schachter v. Citigroup, Inc*. (2009) 47 Cal.4th 610, 618.) The evidence must be viewed in the light most favorable to the nonmoving party. (*Ennabe v. Manosa* (2014) 58 Cal.4th 697, 703; *Schachter*, at p. 618.)

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[3] Statutory references are to this code unless otherwise indicated.

When a defendant moves for summary judgment in a situation in which the plaintiff would have the burden of proof at trial by a preponderance of the evidence, the defendant may, but need not, present evidence that conclusively negates an element of the plaintiff's cause of action. Alternatively, the defendant may present evidence to "'show[] that one or more elements of the cause of action . . . cannot be established' by the plaintiff." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853; see § 437c, subd. (p)(2).) """"'The moving party bears the burden of showing the court that the plaintiff "has not established, and cannot reasonably expect to establish,"' the elements of his or her cause of action."'"" (*Ennabe v. Manosa*, *supra*, 58 Cal.4th at p. 705; accord, *Wilson v. 21st Century Ins. Co*. (2007) 42 Cal.4th 713, 720 [same]; *Kahn v. East Side Union High School Dist*. (2003) 31 Cal.4th 990, 1002-1003 ["the defendant must present evidence that would preclude a reasonable trier of fact from finding that it was more likely than not that the material fact was true [citation], or the defendant must establish that an element of the claim cannot be established, by presenting evidence that the plaintiff 'does not possess and cannot reasonably obtain, needed evidence'"].)

Once the defendant's initial burden has been met, the burden shifts to the plaintiff to demonstrate, by reference to specific facts, not just allegations in the pleadings, there is a triable issue of material fact as to the cause of action. (§ 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 850.) On appeal from an order granting summary judgment, "the reviewing court must examine the evidence de novo and *should draw reasonable inferences* in favor of the nonmoving party." (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 470; accord, *Aguilar*, at p. 843.) "[S]ummary judgment cannot be granted when the facts are susceptible to more than one reasonable inference . . . ." (*Rosas v. BASF Corp*. (2015) 236 Cal.App.4th 1378, 1392.)

2. *The Trial Court Erred in Granting Summary Judgment on the Ground There Were No Actionable Misrepresentations for Which the CBRE Defendants Could Be Found Liable to the Amlap Investors*

The Amlap investors and the CBRE defendants agree, as emphatically stated in the CBRE defendants' brief, "[e]ach cause of action against CBRE encompasses a

derivative liability theory based on CBRE's alleged aiding and abetting of the Hopper Defendants' alleged fraud" and the Amlap investors' "aiding and abetting allegations permeate all causes of action." Yet, other than with respect to the third cause of action for aiding and abetting a securities law violation pursuant to Corporations Code section 25504.1, the CBRE defendants' moving papers did not attempt to negate that theory of liability or present evidence to demonstrate the Amlap investors could not prove their aiding and abetting allegations.[4] Similarly, neither the trial court's oral explanation of its decision to grant the motion in its entirety nor the order granting summary judgment or, alternatively, summary adjudication, prepared for the trial court by the CBRE defendants, addressed this all-pervasive theory of liability.

Generally, summary judgment is improper when the defendant has failed to address a theory of liability or cause of action alleged by the plaintiff, even if it is not separately pleaded in the complaint. (*Scripps Clinic v. Superior Court* (2003) 108 Cal.App.4th 917, 929; see *Crouse v. Brobeck, Phleger & Harrison* (1998) 67 Cal.App.4th 1509, 1534 [if defendant fails to meet its initial burden of showing entitlement to judgment as a matter of law, burden does not shift to plaintiff and motion is properly denied without regard to plaintiff's opposition]; see generally *Lockhart v. County of Los Angeles* (2007) 155 Cal.App.4th 289, 304 ["[a] motion for summary judgment must be directed to the *issues raised by the pleadings*," internal quotation marks omitted].) As Presiding Justice Lillie explained in *Wright v. Stang Manufacturing Co*. (1997) 54 Cal.App.4th 1218, 1228, "'If a plaintiff pleads several theories, the

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[4] In their moving papers the CBRE defendants identified nine issues to be summarily adjudicated, including that the CBRE defendants had no duty to disclose information to the Amlap investors, they made no representations directly to the Amlap investors, and the Amlap investors did not rely on any representations made by the CBRE defendants. None of the issues specifically addressed the Amlap investors' allegations that the CBRE defendants had aided and abetted the Hopper defendants' fraudulent activity in marketing the tenant-in-common interests although, as discussed in the text, the CBRE defendants did contend there were no actionable misrepresentations made by anyone in connection with the tenant-in-common transaction.

defendant has the burden of demonstrating there are no material facts requiring trial on any of them. "The moving defendant whose declarations omit facts as to any such theory . . . permits that portion of the complaint to be unchallenged."' [Citation.] Thus, even if no opposition is presented, the moving party still has the burden of eliminating all triable issues of fact." Accordingly, the failure of the CBRE defendants to challenge, let alone negate, the fifth, sixth, seventh, 12th and 13th causes of action based on the Amlap investors' allegations the CBRE defendants had aided and abetted the Hopper defendants' fraudulent activities in connection with the sale of the tenant-in-common interests in the La Palma Avenue property should have resulted in the denial of their motion with respect to those claims.

In their brief in this court the CBRE defendants appeared to concede their motion had not been directed to the Amlap investors' aiding and abetting or derivative liability theory. They argued, however, they were nonetheless entitled to an affirmance of the order granting summary judgment because the Amlap investors had forfeited the issue by failing to argue in their memorandum in opposition to summary judgment that the CBRE defendants had not shifted the burden on the aiding and abetting claims and because the trial court's resolution of other issues properly presented by their motion necessarily precluded a finding of aiding and abetting liability. They also asserted the arbitration award in favor of the Hopper defendants on the Amlap investors' direct liability claims is entitled to res judicata effect, barring the derivative claims against them.

At oral argument counsel for the CBRE defendants retreated from this position, suggesting, contrary to our own reading of the record and respondent's brief, the issue was properly raised in their moving papers. The record belies this revisionist portrait of the trial court proceedings.[5] As discussed, none of the nine issues presented for summary

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[5] The CBRE defendants do not provide any record citations to support their revised claim that they addressed the aiding-and-abetting theory in their moving papers. (See Cal. Rules of Court, rule 8.204(a)(1)(C) [any reference in a brief to a matter in the record must be supported by a citation to the volume and page number of the record where the

adjudication addressed the Amlap investors' allegations that the CRE defendants materially assisted the Hopper defendants' fraudulent marketing of the tenant-in-common interests. None of the CBRE defendants' other arguments as to why this omission does not require reversal of the order granting summary judgment has merit.

a. *The CBRE defendants' failure to meet their initial burden as moving parties regarding aiding and abetting liability is properly considered on appeal*

Although the CBRE defendants did not raise the Amlap investors' aiding and abetting theory in their moving papers other than in connection with the securities law claim under Corporations Code section 25504.1, in their opposition papers the Amlap investors discussed the applicable governing law and argued the evidence presented was sufficient to establish the CBRE defendants' liability on that basis with respect to actionable misrepresentations and material omissions by the Hopper defendants. The Amlap investors repeated that argument at the hearing on the CBRE defendants' motion, but did not—either in their papers or during oral argument—also assert the CBRE defendants had failed to meet their initial burden as moving parties. It plainly would have been better practice to do so, but that omission does not foreclose the argument on appeal. To the extent the Amlap investors' fifth amended complaint contained allegations sufficient to support their claims of aiding and abetting liability that were not addressed in the CBRE defendants' separate statement of undisputed facts and supporting evidence, summary judgment (and, alternatively, summary adjudication as to all affected causes of action) should have denied. (*Ennabe v. Manosa*, *supra*, 58 Cal.4th at p. 705; *Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 850; see *Y.K.A. Industries, Inc. v. Redevelopment Agency of City of San Jose* (2009) 174 Cal.App.4th 339, 354 ["[w]here the evidence submitted by a moving defendant does not support judgment in his favor, the court must deny the motion without looking at the opposing evidence, if any, submitted by the plaintiff"]; *Consumer Cause, Inc. v. SmileCare* (2001) 91 Cal.App.4th

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matter appears].) If they could, of course, there would be no need to argue, as they do, that the issue had been forfeited.

454, 468 [opposing party has no obligation to establish anything by affidavit or other admissible evidence until the moving party has established facts sufficient to sustain a judgment in its favor].)

b. *Triable issues of material fact concerning misrepresentations and omissions in the materials presented to the Amlap investors by the Hopper defendants preclude summary adjudication on aiding and abetting liability*

"A defendant is liable for aiding and abetting another in the commission of an intentional tort, including a breach of fiduciary duty, if the defendant '"'knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act.'"'" (*Nasrawi v. Buck Consultants LLC* (2014) 231 Cal.App.4th 328, 343; accord, *American Master Lease LLC v. Idanta Partners, Ltd.* (2014) 225 Cal.App.4th 1451, 1477-1478.) Thus, even if the trial court correctly ruled the CBRE defendants owed no duty of disclosure to the Amlap investors—an issue we need not decide—and neither participated in the drafting of the property information package nor made any representations directly to the Amlap investors prior to their purchase of the tenant-in-common interest in the La Palma Avenue property, summary adjudication as to the causes of action for fraud, negligent misrepresentation, breach of fiduciary duty, constructive fraud and unfair business practices was improper because the CBRE defendants failed to carry their initial burden of demonstrating that they were unaware the Hopper defendants owed the Amlap investors a duty of full disclosure regarding the sale of the tenant-in-common interests or that they (that is, the CBRE defendants) did not provide substantial assistance to the Hopper defendants in marketing those interests through actionable misrepresentations or omissions.

To the contrary, reasonable inferences from the evidence, viewed in the light most favorable to the Amlap investors, support a finding the CBRE defendants actively assisted the Hopper defendants' scheme to mislead or defraud the tenant-in-common investors. First, based on statements contained in offers to purchase and letters of intent submitted to the CBRE defendants as the brokers for iStar CTL I, the CBRE defendants were fully aware the Hopper defendants intended that BH & Sons would assign its rights

under the iStar PSA to new investors. For example, in a June 22, 2006 letter of intent James Hopper, on behalf of Asset Management Consultants, wrote Batcheller that, "prior to closing, the Buyer . . . will assign some or all of its interests in the Purchase and Sale Agreement to one or more entities that are either affiliates of Asset Management Consultants, Inc. and/or AMC's investment partners." That same language was repeated in subsequent offers/letters of intent. And the June 30, 2006 email to Batcheller concerning a "gross-up" in the purchase price, discussed in the next paragraph, was expressly premised on the Hopper defendants' intention to syndicate and market tenant-in-common interests in the property. Confirming this, Batcheller testified at his deposition that, as of the time of the best-and-final offer and due diligence on the purchaser of the La Palma Avenue property, he understood Asset Management Consultants was a tenant-in-common (or "TIC") manager. In fact, the grant deed ultimately prepared for the transaction conveyed the property directly from iStar CTL I to the tenant-in-common purchasers.

Second, the CBRE defendants assisted the Hopper defendants in disguising the syndication and structuring fees to be paid by the tenant-in-common investors as part of the two-step transaction. In James Hopper's June 30, 2006 emailed letter to Batcheller modifying the letter of intent to reflect points discussed in several telephone conversations involving Batcheller, Hopper and Russell S. Hardt, director of acquisitions for Asset Management Consultants, the purchase price for the property was confirmed as $33.25 million, payable in cash at closing. However, in an email to Batcheller also sent the morning of June 30, 2006, Hardt stated, "Per our conversation a few moments ago, please make the seller aware of our intention to 'gross up' the purchase price by $1,300,000 to cover certain TIC and startup costs. Buyer will cover any costs which seller may incur as a result of this procedure. This is a normal procedure in our TIC transactions, and has been acceptable to all other sellers we have dealt with, but wanted to give you and the seller a 'heads up' that this price adjustment will appear in our P&S agreement comments." Batcheller then forwarded the email to one of his principals, with

the comment, "FYI regarding a 'Gross up' of the purchase price. [¶] Please confirm this is OK."

A draft of the iStar PSA, dated "July __, 2006," reflected the negotiated purchase price of $33.25 million in section 1.1.3; indicated in section 1.1.7 there was no purchaser's broker; and provided in section 8.6 that the seller was responsible to seller's broker for a real estate sales commission at closing and would not, under any circumstance, "owe a commission or other compensation directly to any other broker, agent or person." Subsequent drafts (for example, one dated July 25, 2006) and the final version of the iStar PSA, dated July 26, 2006, indicated the purchase price for the property was $34.55 million—the negotiated price of $33.25 million plus the "gross up" of $1.3 million; identified Asset Management Consultants as the purchaser's broker in section 1.1.7; and provided in section 8.6 that the seller would be responsible at closing for payment of a real estate commission to purchaser's broker (that is, Asset Management Consultants) of $1.3 million.[6]

The Hopper defendants, in marketing the La Palma Avenue property to prospective investors, utilized the $34.55 million figure as if it were the negotiated purchase price for the property and continued to mischaracterize the $1.3 million gross-up in price as a commission that would be paid by iStar CTL I rather than a separate syndication fee actually being charged the investors in addition to the disclosed 6 percent fee to be paid to BH & Sons for assignment of the iStar PSA. The Amlap investors alleged, and presented evidence through the declaration of Marvin Sampson, the manager of Superstition Lookout, that in purchasing their tenant-in-common interest they believed the $34.55 million purchase price was at or below the market value of the property based upon arms-length negotiations and that the $1.3 million identified as a commission for the buyer's broker was, in fact, a commission to be paid by the seller, not the investors who acquired BH & Sons's interest in the iStar PSA through assignment. Sampson also

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[6] CBRE's 2 percent commission was based on the actual $33.25 million purchase price.

testified the Amlap investors would not have invested in the La Palma Avenue property had they known the true facts regarding the actual purchase price/fair market value of the property and the nature of the $1.3 million payment to Asset Management Consultants.

Based on this evidence, a finder of fact could reasonably conclude the CBRE defendants knew the grossed-up purchase price and mislabeled commission fee would be communicated to potential investors by the Hopper defendants and, even though not directly involved in the preparation of the marketing materials or solicitation of investments, facilitated this deception by acquiescing in the misleading revisions to the iStar PSA. Accordingly, summary adjudication on the fifth, sixth, seventh, 12th and 13th causes of action should not have been granted.[7]

c. *The arbitration award in favor of the Hopper defendants is not entitled to res judicata effect*

Citing authority that a nonarbitrating party whose liability, if any, is derivative of that of an arbitrating party is entitled to the res judicata effect of a final arbitration award in favor of the direct tortfeasor (see, e.g., *Richard B. LeVine, Inc. v. Higashi* (2005) 131 Cal.App.4th 566, 579; *Brinton v. Bankers Pension Services, Inc*. (1999) 76 Cal.App.4th 550, 557-558), the CBRE defendants contend the arbitration award in favor of the Hopper defendants issued by arbitrator Chernick is properly considered on appeal, even though issued and confirmed after the grant of summary judgment, and is entitled to res judicata effect. As such, they contend, notwithstanding the evidence discussed above suggesting the Hopper defendants may have engaged in fraud, the arbitration award exonerating them necessarily bars the Amlap investors' derivative liability claims as well.

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[7] The trial court ruled the Amlap investors' request for punitive damages was moot because, in light of its other findings, there were no remaining causes of action that would support such an award. Because we reverse the order granting summary adjudication of the Amlap investors' fraud and breach of fiduciary duty claims, we similarly reverse the order granting summary adjudication as to punitive damages.

As discussed, the judgment confirming the arbitration award is pending on appeal. In their opening brief in that appeal, and in their briefing in the case at bar, the Amlap investors challenge the order compelling arbitration of their claims against the Hopper defendants, arguing the arbitration provision in the iStar PSA required arbitration of disputes between iStar CTL I and BH & Sons, and arguably between iStar CTL I and the tenant-in-common investors, including the Amlap investors, as assignees of BH & Sons, but not between the tenant-in-common investors and BH & Sons or its affiliates and agents (that is, Asset Management Consultants and the other Hopper defendants). We considered a substantially similar, if not identical, question in *Ahern v. Asset Management Consultants, Inc*. (Aug. 11, 2015, B253974 & B257684) (nonpub. opn.),[8] a case involving the Hopper defendants and a different set of tenant-in-common investors, and agreed with the investors, holding the trial court had erred in compelling arbitration pursuant to the iStar PSA, which neither established nor governed any relationship between the investors and the Hopper defendants. Accordingly, we reversed the judgment confirming the arbitration award in favor of the Hopper defendants and remanded the matter with directions to the superior court to deny the Hopper defendants' petition to confirm the arbitration award and to grant the Ahern parties' petition to vacate the award.

In light of that prior ruling we decline to give any res judicata effect to the award against the Amlap investors in a proceeding that was also compelled pursuant to the arbitration provision in the iStar PSA and that may be overturned when the Amlap investors' appeal is considered. (See generally *Kopp v. Fair Pol. Practices Com*. (1995) 11 Cal.4th 607, 620-622 [recognizing public interest and "injustice" exceptions to res judicata doctrine].)

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[8] Because it is directly relevant to the proper application of the doctrine of res judicata to the case at bar, citation to, and reliance on, our unpublished decision is proper under rule 8.115(b)(1) of the California Rules of Court.

3. *The Trial Court Properly Granted Summary Adjudication on the Third Cause of Action for Materially Assisting a Securities Law Violation*

Corporations Code section 25401 makes it unlawful for any person in connection with the offer or sale of a security, directly or indirectly, to make an untrue statement of material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which they were made, not misleading. Corporations Code section 25504.1 provides any person who "materially assists in any violation" of specified sections of the Corporations Code, including section 25401, "with intent to deceit or defraud," is jointly and severally liable for such a violation.

The heightened requirements for secondary liability under Corporations Code section 25504.1 were explained in *AREI II Cases* (2013) 216 Cal.App.4th 1004, which affirmed the trial court's ruling sustaining without leave to amend the demurrer of investment bankers to a cause of action under Corporations Code section 25504.1. The plaintiff tenant-in-common investors had alleged state securities laws were violated by the failure to disclose that the sole owner of the issuer was a felon and that the property that was the subject of the investment was grossly overleveraged. The investment bankers had structured joint ventures between the issuer and various lenders but had no involvement in the sales of the tenant-in-common interests to the investors. The court explained that section 25504.1 "makes clear that a person must have materially assisted *in* the securities law violation. Therefore, for purposes of section 25504.1, it is not enough that a person provided material assistance in a larger scheme to defraud if that person had no role or involvement in the part of the scheme that constituted a violation of the securities laws. Here, the primary violation is selling or offering to sell a security by means of false and misleading statements, in violation of section 25401. To support liability under section 25504.1 for such a violation, the complaint must include allegations demonstrating how the defendant assisted in the act of selling or offering to sell securities by means of false and misleading statements." (*AREI II Cases*, at pp. 1014-1015.) The court gave as examples of the necessary assistance aiding in the preparation of offering documents, communicating misrepresentations directly to

investors "or otherwise playing a material, facilitating role in the act of selling or attempting to sell the securities . . . ." (*Id.* at p. 1015.) Similarly, in *Moss v. Kroner* (2011) 197 Cal.App.4th 860, this court recognized certain defendants' potential secondary liability under Corporations Code section 25504.1 because they had "promoted and represented [the issuer of the securities] in effecting or attempting to effect sales of securities in California . . . ." (*Moss*, at pp. 871, 878.)

Although rejecting secondary or aider-and-abettor liability under the Corporate Securities Law of 1968, the court in *AREI II Cases, supra*, 216 Cal.App.4th 1004, reversed the trial court's order sustaining the investment bankers' demurrer to the cause of action for common law fraud based upon a conspiracy to defraud the investors. (*Id.* at pp. 1021-1025.) That is, the alleged participation by the investment bankers in an effort to conceal the owner's felony conviction and the $5.1 million mezzanine loan from investors was sufficient for a claim of derivative liability under the common law even if they had not provided material assistance in the alleged securities violation itself, as required by Corporations Code section 25504.1. Similarly here, whatever the CBRE defendants' role in assisting the Hopper defendants to mislead potential tenant-in-common investors, the undisputed evidence is that they did not prepare or assist in preparing the offering documents, promote the investment or solicit potential investors and made no direct representations to potential investors before they purchased their tenant-in-common interests. Accordingly, the trial court properly granted summary adjudication as to the third cause of action.

The Amlap investors do not contest the trial court's conclusion the evidence established the CBRE defendants had not given written consent to be identified in the offering materials provided potential investors in connection with marketing the tenant-in-common interests in the La Palma Avenue property and had not prepared or certified any expert material for inclusion in those marketing documents, a necessary element of their second cause of action for violation of Corporations Code section 25504. Accordingly, we affirm the grant of summary adjudication as to that claim, as well.

DISPOSITION

The judgment is reversed and the cause remanded for the trial court to vacate its order granting summary judgment or, alternatively, summary adjudication as to all causes of action alleged against CBRE and Batcheller and to enter a new order denying the motion for summary judgment, granting the motion for summary adjudication as to the second and third causes of action under the Corporate Securities Law of 1968 and denying the motion for summary adjudication as to all other causes of action. Amlap ST and Superstition Lookout are to recover their costs on appeal.

PERLUSS, P. J.

We concur:

ZELON, J.

SEGAL, J.